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What Bill C-32 Misses: Copyright in academic life...

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WHAT BILL C-32 Misses: Copyright in Academic Life...

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(with thanks for conversations with Dr. John Tooth
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Dan Hynes and Dave Morrison)

What is the difference between Copyright and Plagiarism?



COPYRIGHT is a legislated set of rights;

PLAGIARISM is a question of literary and cultural norms:

Certain institutions and groups, using contract law, can make plagiarism a wrong for which a person can be sanctioned. For example, at UWO, as at other post-secondary institutions, plagiarism exists as an “academic offence”:

Vis-à-vis **students**, it has been declared by Senate as an offence and enforced under the terms of the contract between the student and the university;

Vis-à-vis **faculty**, it was negotiated as an academic norm by the faculty union, The University of Western Ontario Faculty Association (UWOFA), and the University and is defined in the Collective Agreement and enforced by the University against faculty members through the disciplinary process created in the Agreement.

Other than in such special arrangements, plagiarism that does not amount to copyright or moral rights infringement is not actionable in law in Canada.

Recall the basic rights given copyright holders under the Copyright Act:



Economic rights in works

Economic rights in “other subject matter”

to produce, reproduce

to perform in public

to translate

to convert from one type of
work to another

to make sound recordings or
cinematographs

to communicate the work by
telecommunication

to present art created after
1988 in public

to rent computer programs

to authorize any of the above

**AccessCopyright
focused here for
English print
works**

to communicate a **performer's
performance** by
telecommunication

to “fix” a **performer's
performance**

to reproduce a fixed **performance**

to rent out a sound recording of
the **performance**

to publish, reproduce or rent a
sound recording

to fix a **broadcast signal**

to retransmit a **signal**

to authorize any of the above

Licenses and Permissions



It is the copyright holder's prerogative

- (a) to decide whether or not to grant permission (a license) to a requestor to make any particular use of a work (or other subject matter); and
- (b) if granting permission, to charge or not charge for that permission.

The charge for making use of materials is generally termed the **TARIFF** if it is an amount established by the Copyright Board of Canada in a situation involving a blanket license obtained from a copyright collective organization or a **ROYALTY** where an individual license is concerned.

Licenses under the Copyright Act are required to be in **writing** (s.13(4)) and so it is best to get all permissions in writing.

If you use a work without obtaining permission – or without obtaining permission from the correct rightsholder – you are using the work **AT RISK** of a suit for copyright infringement.

Merely acknowledging source and author may satisfy the moral rights requirements of the Copyright Act but does not provide a defense to a lawsuit for copyright infringement.

Remember that the **moral rights** are separate from the **economic rights** in WORKS and non-transferable and therefore cannot be exercised by anyone other than the original author...

In Canada, the author of a work has a right :

- to the **integrity** of the work (i.e. to prevent the work from being distorted, mutilated or otherwise modified *to the prejudice of the honour or reputation of the author*)
 - where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym (as well as the right to remain anonymous) [often referred to as the right to **paternity**]
 - to prevent the work from being used in association with a product, service, cause or institution *to the prejudice of the honour or reputation of the author* [commonly referred to as the **right of association**].
- **IF PASSED, Bill C-32 will give moral rights to performers (as well as the economic rights they were given in the 1997 amendments)**
 - Not transferable... licensing not an option.

Parliament, the Copyright Board and the Courts...

Parliament –

Bill C-32 The *Copyright Modernization Act*

Introduced Tuesday, June 2, 2010...

The Copyright Board –

4 tariff proceedings are in play, at various stages, and one of them directly involves post-secondary institutions...

The Federal Court of Appeal –

1 of the 4 tariff proceedings was decided by the Copyright Board and has been judicially reviewed by this court... and that decision is now being appealed to the Supreme Court of Canada

These three copyright policy - developing areas are interrelated...

Parliament's tightrope in Bill C-32:

If it broaden users' rights too much?

TRIPS and other agreements Canada has signed privilege copyright holders over users:

Members [states] shall confine limitation or exceptions to exclusive rights

To certain special cases
which do not conflict with a normal
exploitation of the work
And do not unreasonably prejudice
the legitimate interests of the right
holder

(the “3 step” test)

If it narrows users' rights too much?

The SCC, beginning some years ago in the Theberge case, and continuing forward to the 2004 decision in the Law Society case, has spoken of users' rights needing to be respected as well as those rights created under the copyright regime for copyright holders.

Such “rights” language may be interpreted as invoking the protection of the Charter value of freedom of expression (s.2(b)) – Parliamentary attempts to extend the rights of copyright holders might be found to be unconstitutional.

Canada has not had a decision like the American's SC in *Eldred v. Ashcroft* (2003) – and the outcome here could well be different...

If you are doing something only the copyright holder has a right to do – and you do not have a “user’s right” under the Copyright Act to do it – then the following terms become relevant:



Assignment

License

Royalty

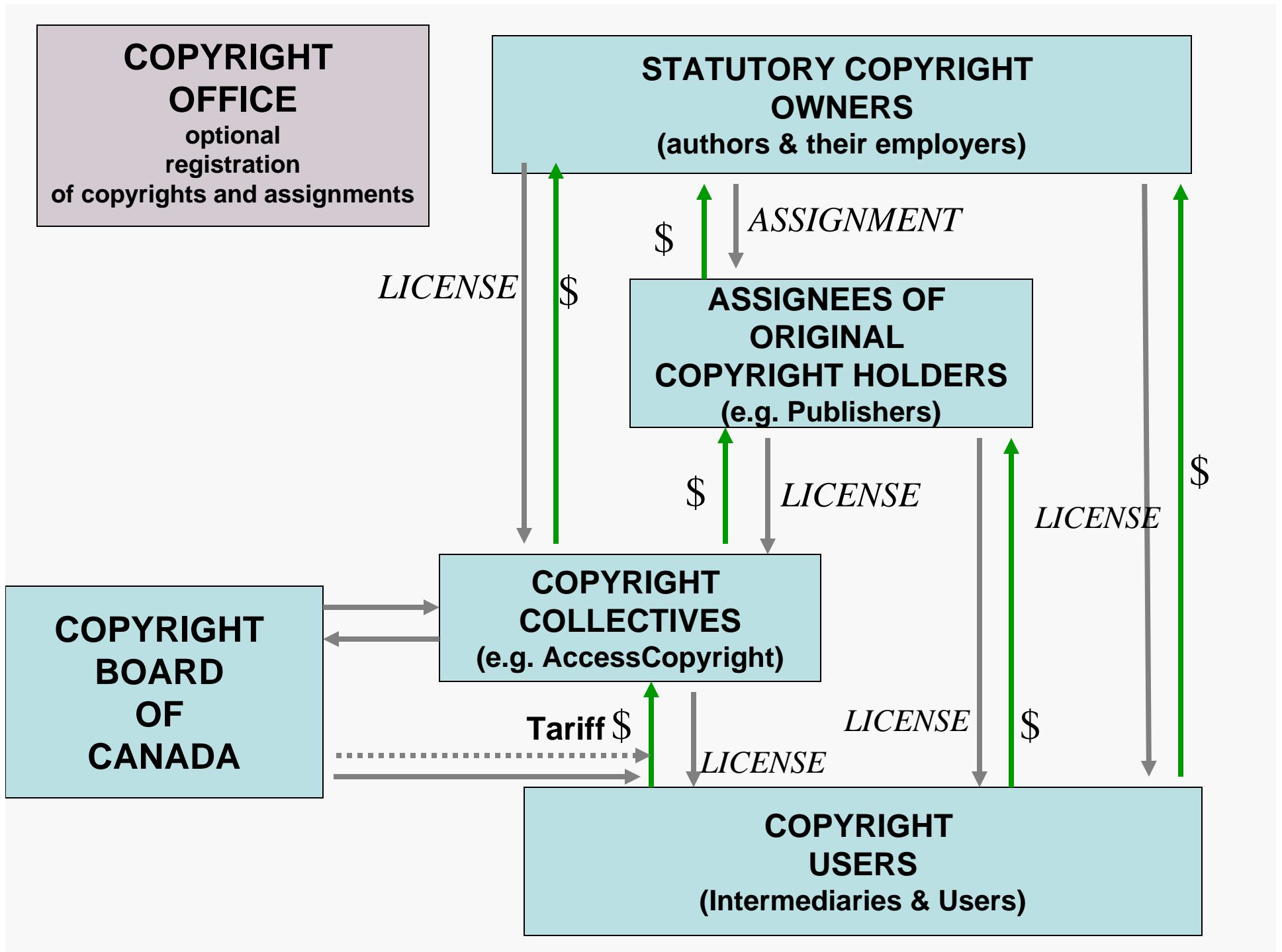
License fee

Tariff

\$\$

Permission

**IF YOU DO HAVE A USER’S RIGHT, THEN YOU DO NOT NEED PERMISSION –
And none of those terms are relevant --**



What recent processes before the Copyright Board presage the current academic situation?

1. In the education sector,

- **School boards** everywhere except in Quebec have been affected by the decision of AccessCopyright to take the Ministers of Education to the Board for a Tariff for **2005-2009...**
- **School boards** everywhere except in Quebec are now being affected by the decision of AccessCopyright to take the Ministers of Education to the Board for a Tariff for **2010-2012**
- **Universities and Colleges** are affected by the recent decision by AccessCopyright to abandon individual negotiations with universities (or with an organization representing them) and to apply instead for a Tariff before the Board.

2. In the government sector, AccessCopyright has applied to impose a Tariff for 2005-2009 and another for 2010-2012 to the Provincial and Territorial governments...

Collectives have long existed in the music industry --

**Canadian Performing
Rights Society 1926**

1935 – Copyright Appeal Board created for these rights

**Composers Authors & Publishers
Association of Canada
CAPAC 1946**

**BMI Canada
1940**

**PROCAN
1978**

1988 - Copyright Act amendments

**SOCAN
1990**

A Collective is, generally, a voluntary organization that represents the holders of a particular economic copyright *in terms of the administration and enforcement of selected rights associated with that copyright*

Music performing collectives

SOCAN

Retransmission collecting bodies

SOCAN (also)

Other reproduction collectives

CMRRA (mechanical reproductions of music)

CANCOPY and COPIBEC (successor to UNEQ) -
reproduction rights only

The Copyright Board website lists more than 30 collectives --



The following are involved in rights management associated with “works” under s.3:

1. Access Copyright
2. ACF – Audio Cine Films
3. AVLA – Audio-Video Licensing Agency
4. CARCC – Canadian Artists’ Representation Copyright Collective
5. CBRA – Canadian Broadcasters Rights Agency
6. CMRRA – Canadian Musical Reproduction Rights Agency
7. Criterion Pictures
8. COPIBEC – Societe quebecoise de gestion collective des droits de reproduction
9. CRC – Canadian Retransmission Collective
10. CRRRA – Canadian Retransmission Right Association
11. ERCC – Education Rights Collective of Canada
12. FWS – FWS Join Sports Claimants
13. MLB – Major League Baseball Collective of Canada
14. PGC – Playwrights Guild of Canada
15. SOCAN – Society of Composers, Authors and Music Publishers of Canada
16. SACD – Societe des auteurs et compositeurs dramatiques
17. SODRAC – Society for Reproduction Rights of Authors, Composers and Publishers in Canada
18. SOPROQ – Societe de gestion collective des droits des producteurs de phonogrammes et videogrammes du Quebec
19. SoQAD – Societe quebecoise des auteurs dramatiques

s.3(1) Right	Associated Collective Society
Produce or Reproduce the Work	Access Copyright (writing) AVLA (music: videos and audio) CARCC (visual arts) CMRAA (audio & music) COPIBEC (writing) SODRAC (music)
Perform the Work in Public	ACF (films) Criterion Pictures (films) ERCC (tv and radio, education only) SOCAN (music) SoQAD (theatre, education only)
Publish the Work	
(a) Translate the Work	
(b) Convert a dramatic work	
(c) Convert a non-dramatic work by performance	

s.3(1) Right	Associated Collective Society
(d) sound/cinematography film to mechanically reproduce a literary, dramatic or music work	
(e) Adapt a work as a cinematographic work	
(f) Communicate the work by Telecommunication	CBRA (tv) CRC (tv and film) CRRA (tv) FWS (sports) MLB (sports, baserball) SACD (theatre, film, radio, audio) SOCAN (music) SOPROQ (audio and video)
(g) Present an Artistic work at a Public Exhibition	
(h) Rent out a Computer Program	
(i) Rent out a Sound Recording	

Copyright Office

established under **s. 46**

administered under
Canadian Intellectual
Property Office (CIPO)
within Industry Canada

keeps registry of
copyrights and
assignments (optional
process in copyright)

Copyright Board

established under **s. 66**

administrative tribunal

must approve all tariffs and
fees charged by collectives

can also set individual
royalties when requested

also can grant non-exclusive
licenses for use of works of
unlocatable owners

increasing importance

Not, of course, forgetting the role of the provincial courts and Federal Court in adjudicating infringement actions under the Act, and the Federal Court (trial and appeal levels) in adjudicating disputes under the Act involving registration, and sitting on review of these administrative tribunals, all determining rights created under the Act

The Copyright Board's formula for setting tariffs:



- **Take all copying done within the institution**
(determined by actual surveying, using statistically robust sampling)
 - **Subtract all copies for which the rightsholders should not be compensated**
 - (a) because the materials in question were not “works” or works in which the rightsholders in the collective have rights (eg materials created by schools for themselves, in which they hold copyright)
- AND
- (b) because although the materials in question are *prima facie* materials in which the collectives’ members have rights, there are users’ rights (exceptions) which mean the rightsholders are not exercise their rights for these uses (fair dealing, rights for educational institutions or LAMs)

SUB- TOTAL: NUMBER OF COMPENSABLE COPIES

x the value of each copy as determined on economic evidence by the Copyright Board

EQUALS THE AMOUNT OF THE TARIFF EACH INSTITUTION IS TO PAY TO THE COLLECTIVE

“subtract” materials that are not works and are not protected by copyright -

- the Act only protects substantial portions or the whole of original expressions -
 - **Unfortunately, what constitutes a substantial portion of a work is, in Canada, a qualitative test and therefore difficult to determine with certainty**
- And the Act only protects works and other subject matter for specified lengths of time; generally for works, the life of the author + 50 years, and for other subject matter, generally, for 50 years... so, older works are not in copyright.

If passed, Bill C-32 will give the same protections to photographs as are now given to every other work under the Copyright Act – for the same period of life of the photographer + 50 years...

And, in general, ownership will lie with the photographer – but for certain private uses, a commissioning person will still have rights...

“subtract” activities performed by users and intermediaries, such as librarians, that do not ever come into the realm of copyright holders’ rights...

- Purchasing individual copies of materials from commercial publishers, to use or distribute to clients is fine
- Traditional ways of using and disseminating knowledge by looking it up and then re-expressing it in your own words is fine

Reading is not a use included in the copyright holders’ bundle of rights;

Borrowing is not a use traditionally included in the copyright holders’ bundle... (although that bundle does now include rentals of sound recordings and computer programs)

The situation of the K-12 Tariff for 2005-2009

The **Copyright Board** rendered its decision in the tariff proceeding
between

The Ministers of Education (the users)
and
Access Copyright (the copyright holders)

June 26, 2009

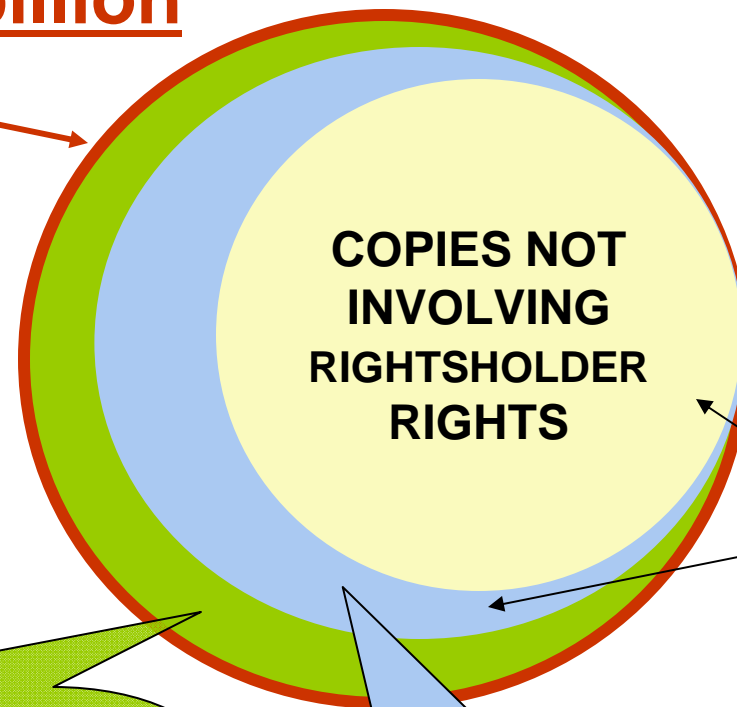
**Setting the amount schools needed to pay the owners of copyright in
print materials for photocopying during the years 2005-2009
everywhere in Canada except in Quebec**

**This replaced the Pan Canadian Schools/Cancopy License Agreement
agreed between the Ministers of Education and Cancopy (without
going to the Board) that lasted from 1999 until 2009...**

See: <http://www.cb-cda.gc.ca/decisions/2009/Access-Copyright-2005-2009-Schools.pdf>

K-12 2005-2009 findings of the Copyright Board -

ALL COPIES MADE – 10.3 billion



98%

**COMPENSABLE COPIES (2%)—
250 million**

X value per copy

= total tariff of \$5.16/student

**(previous agreement negotiated without
the Board – \$2.56/student)**

**COPIES INVOLVING
RIGHTSHOLDERS' RIGHTS BUT
WHERE USERS' RIGHTS
EXEMPT THESE USES**

At the Federal Court of Appeal – File No.A-302-09

The Province of Alberta as Represented by the Minister of Education
(and Others) – Applicants

And

The Canadian Copyright Licensing Agency Operating as “ACCESS
COPYRIGHT” – Respondent

And

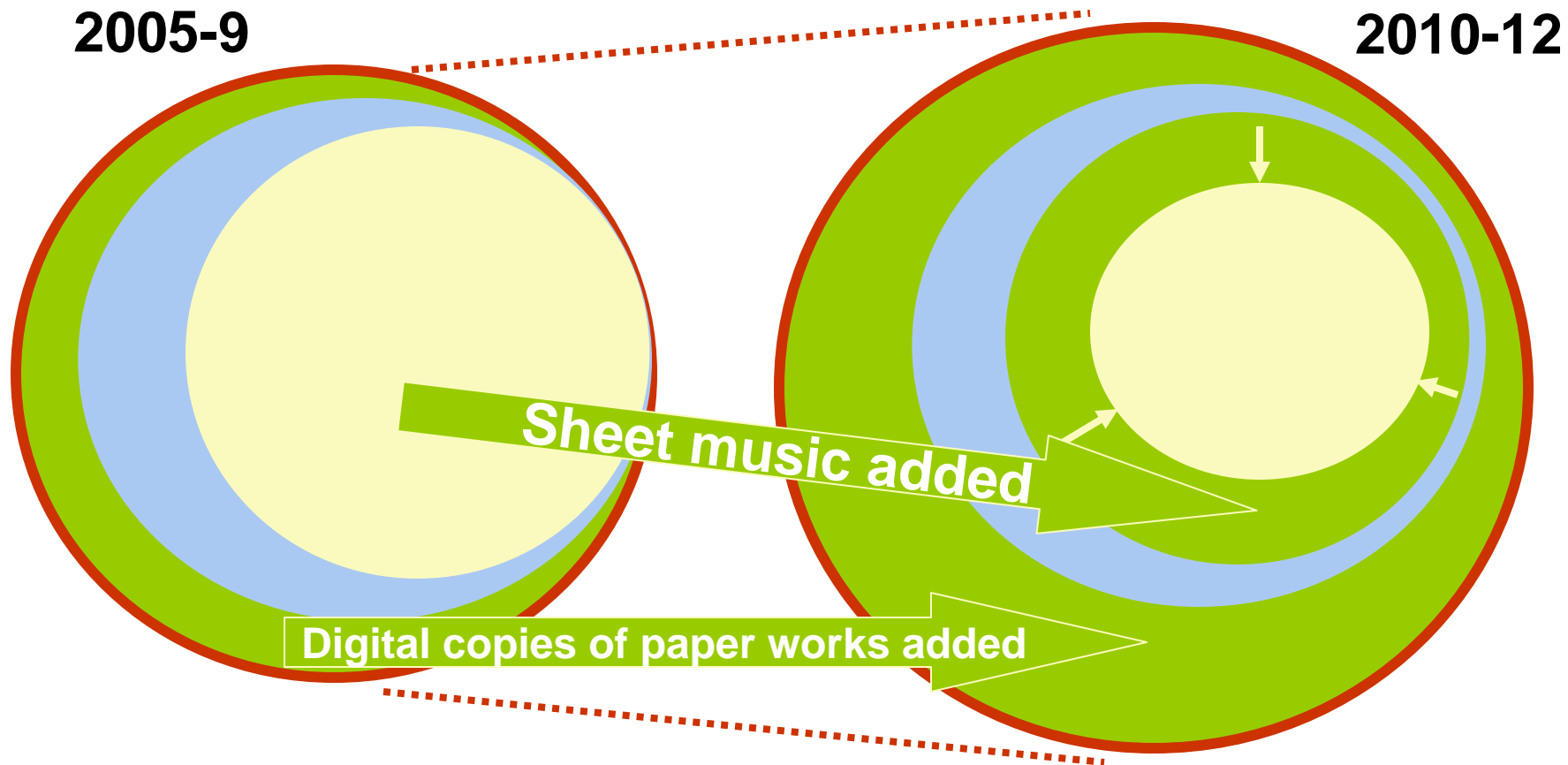
Canadian Association of University Teachers – Intervener (#1)
(Leave to intervene sought November 27, 2009 and given December 23, 2009)

And

**Canadian Publishers’ Council, The Association of Canadian Publishers,
and the Canadian Educational Resources Council – Interveners (#2)**
(Leave to intervene sought January 7, 2010 and given February 18, 2010)

The appeal was heard Tuesday June 8 and the decision released July 23, 2010 – Justice Trudel writing for Chief Justice Blais & Justice Noël

K-12 new 2010-2012 tariff before the Copyright Board



ALL COPIES MADE

No Rights

**Compensable
Copies**

**Users' Rights exempt
for these uses**

What is Access Copyright proposing for the 2010-2012 tariff?

Tariff fee proposed is \$15.00/FTE student— up from the \$5.16/FTE student appealed to the Federal Court of Canada and to be adjusted slightly by remission back to the Board on the question of whether exam copying was actually not available in a medium that is appropriate for the purpose and thus not compensable (which would reduce the tariff now payable of \$5.16 a bit

(but note enlarged scope of “product” AccessCopyright is offering in the 2010-2012 tariff for schools)

Canadian Ministers of Education (CMEC) has indicated its intention to oppose...

Access Copyright has not sought a hearing date with the Copyright Board to pursue this new tariff...

Access Copyright's proposed 2005-2009 and 2010-2014 Provincial and Territorial Government Tariffs

- Proposed fee is \$24.00/FTE civil servant
- Coverage of the proposed Tariff is similar to Schools Tariff

Presumably AccessCopyright expects less government copying to be identified as non-compensable because of the users' rights in the Act (the difference between seeking \$15/student and \$24/civil servant)

The Copyright Board has set this tariff for hearing September 13, 2011...

What is happening between AccessCopyright and Post-secondary Institutions?

- Back this past Winter, Access Copyright was writing to each college and university directly (since the actual signed licenses in place are individual to each institution and Access Copyright) giving individual notices of its intention to terminate the existing licenses and begin negotiations anew
- These letters mentioned that the new license terms and conditions might be created either by agreement of the parties (that is, Access Copyright and the university or college to whom the letter was addressed) OR by the Copyright Board...
- But, at any time, a collective CAN apply to the Board if the amount to be paid by a copyright user and a copyright owner cannot be agreed between them (s.70.2) ... and Access Copyright has decided now to abandon negotiation for licenses with individual universities and has now applied to the Board for a Tariff (as it has now done, as we have seen, for schools)

What is AccessCopyright's proposed Tariff for Post-Secondary institutions for 2005-2009?

On March 30th, 2010, Access Copyright filed a proposal with the Copyright Board of Canada for a tariff for reproductions for course packs and day-to-day photocopying for Post-Secondary Educational Institutions

Unlike the 2005-2009 School Tariff, the proposed post-secondary tariff would include **both print and digital works** in its repertoire

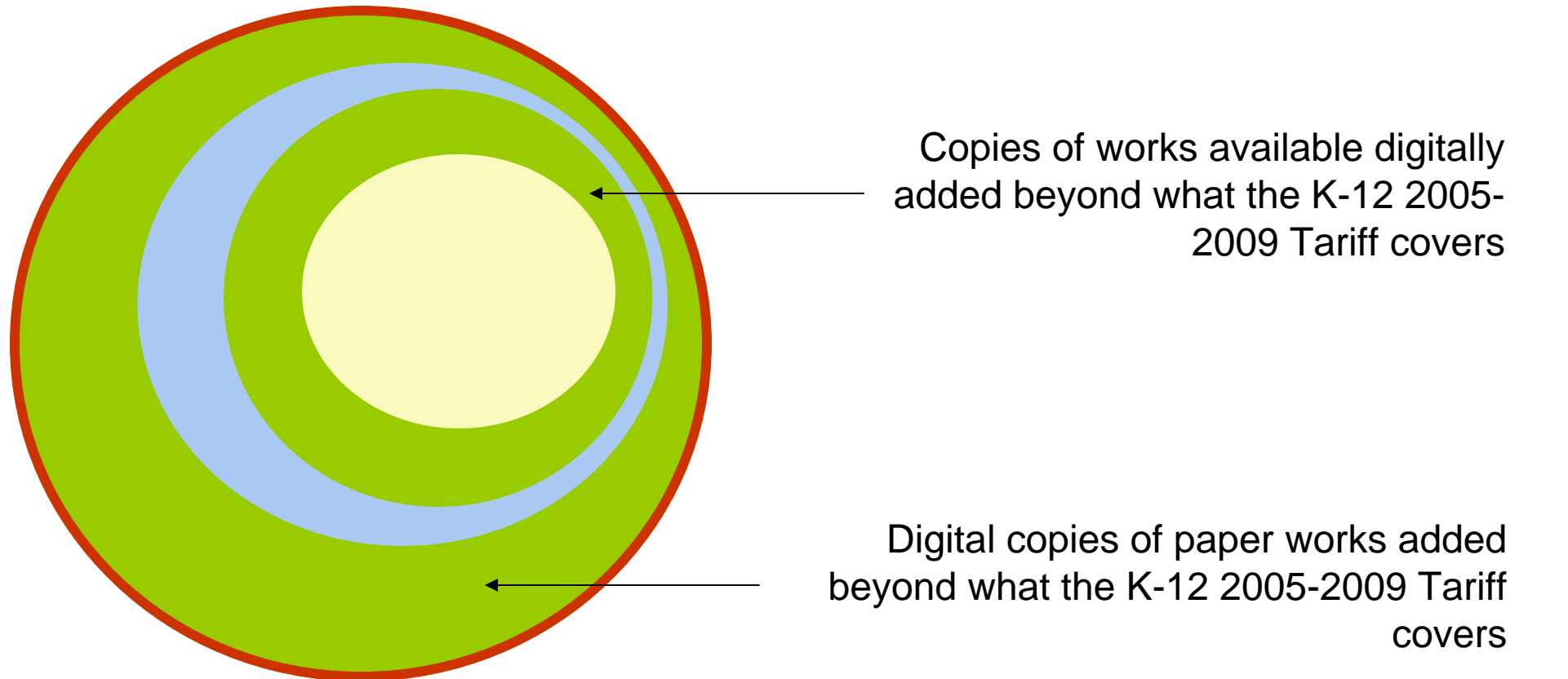
The proposed tariff is \$45.00/FTE – presumably the difference AccessCopyright expects between the value of print and print to digital in the education and civil service tariffs and print and digital in this one for universities and colleges

The proposed tariff is posted to the Copyright Board of Canada website

The Association of Universities and Colleges of Canada (AUCC), authorized by the individual institutions, wrote opposing (July 15, 2010) – other university-related organizations have written opposing (such as the Canadian Association of University Teachers (CAUT), although it does not represent institutions on which the tariff would be levied) --

How might these future Tariff proceedings before the Board be affected by Bill C-32 if it passes?

2011-2013 Post- Secondary Tariff as Proposed for \$45/FTE



ALL COPIES MADE

No Rights

**Compensable
Copies**

**Users' Rights exempt
for these uses**

The greatest area of exemption for any institution's activities is FAIR DEALING

Research

Private study

Criticism *

Review *

News reporting *

* if source and attribution mentioned

Bill C-32 would expand FAIR DEALING to add
Education
Parody
Satire

And a category of Non-commercial user-generated content (s.29.21)

And reproduction for private purposes – without circumventing Technological Protection Measures (s.29.22)

And time-shifting (s.29.23)

And back-up copies (s.29.24)

The Supreme Court has said:

“It is only if a library were unable to make out the fair dealing exception under section 29 that it would need to turn to the Copyright Act to prove that it qualified for the library exception.”
(LSUC case)

Technological Protection Measures (TPMs) are given legal sanction by Bill C-32



BUT NOT IF THEY INTERFERE WITH

- **Interoperability**
- **personal data protection or privacy rights**
- **Access needs because of perceptual disability**

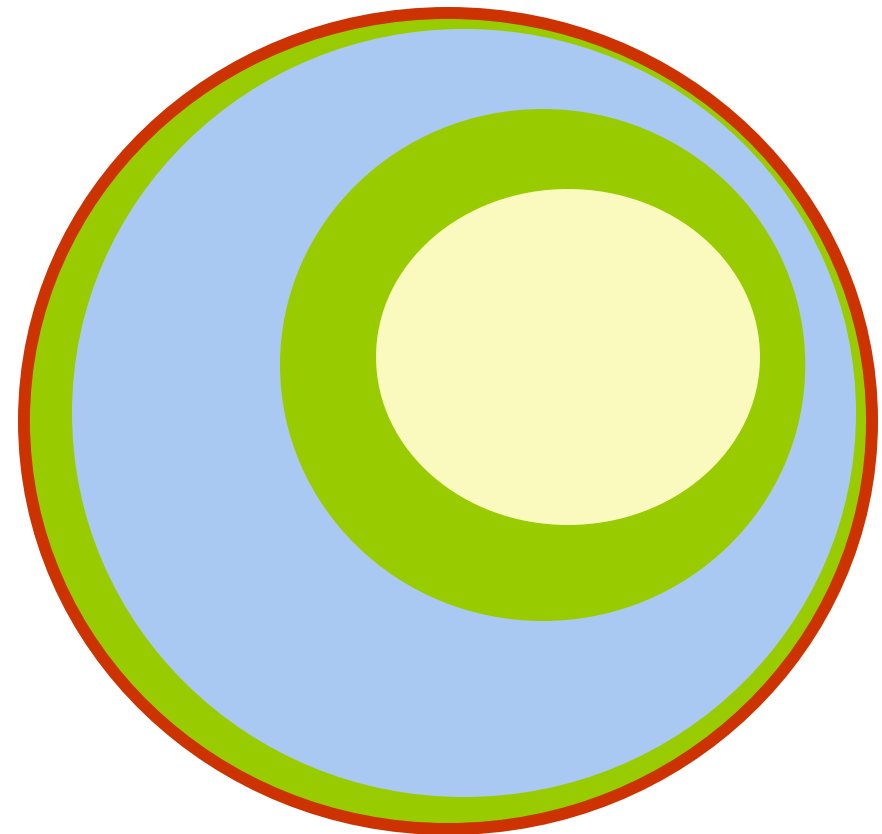
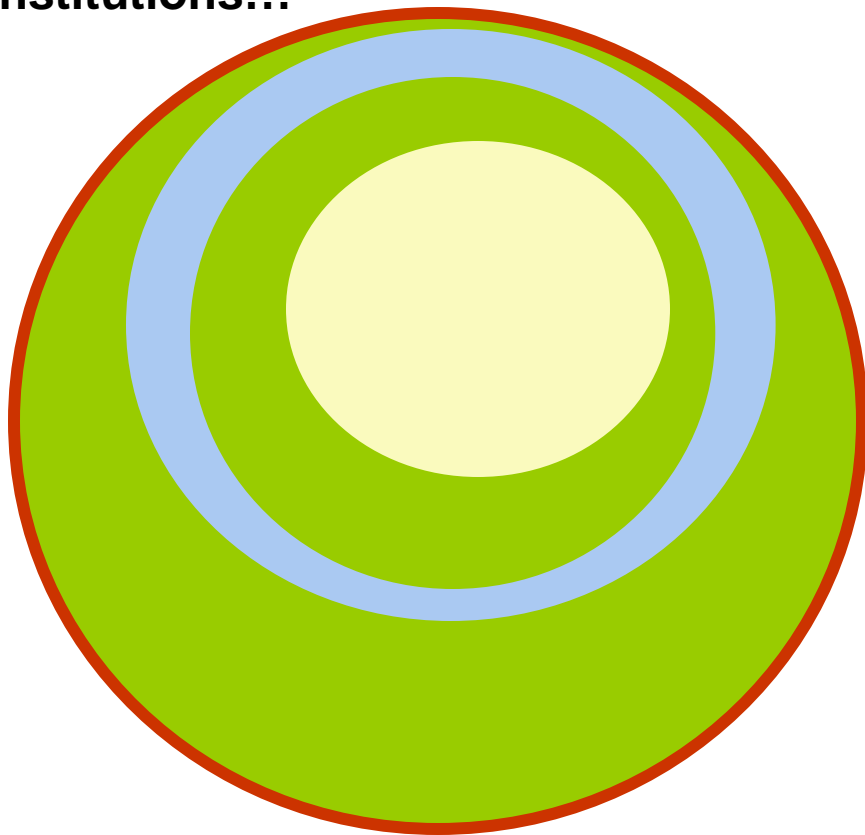
AND

- **Libraries which are LAMs and Educational Institutions (as defined) have special defence provisions with respect to the TPM sections**

Note: the definition of “Libraries, Archives and Museums” (LAMs) is not changed by Bill C-32 and therefore, to the extent that Bill C-32 provides privileges to LAMs it further divides libraries amongst themselves -- those who are owned by for profit entities (most special libraries and some educational institution’s libraries, for example) will not have access to the increased exemptions of their LAMs colleagues... and, similarly, for “educational institutions”

If Fair Dealing Users' Rights are enlarged and if Educational and LAMs Exceptions are expanded?

Again, what AccessCopyright is asking from Post-Secondary Institutions...



... and how Bill C-32 might change the equation.

ALL COPIES MADE

No Rights

**Compensable
Copies**

**Users' Rights exempt
for these uses**

But recall that Bill C-32 is silent on collectives...



In the licenses negotiated by universities and colleges with AccessCopyright (without the intervention of the Copyright Board tariff process), there were typically 2 important clauses:

1. There was a recital at the beginning that Access Copyright and the institution signing the agreement agreed to disagree on the extent of fair dealing...

And

2. There was an indemnification clause under which Access Copyright agreed to compensate the college or university if a copyright holder who was not a member of Access Copyright successfully sued the institution (because such a copyright holder would not be covered by the license).

Neither of these clauses can appear in a tariff created by the Copyright Board – and so they don't...

But recall that Bill C-32 is silent on collectives...



To give colleges and universities the protection under tariffs that they had negotiated under the earlier licenses, the Copyright Act would have to be changed

1. To say that contracts cannot override fair dealing rights

And

2. Where a collective exists, it represents that class of rightsholders on a worldwide basis unless the rightsholder specifically opts out (the extended repertoire or extended licensing system)

Bill C-32 proposed neither of these changes to the Copyright Act...

Thank You

1. **Copyright Board of Canada** <http://www.cb-cda.gc.ca/>
2. Margaret Ann Wilkinson, “**Copyright, Collectives, and Contracts: New Math for Educational Institutions and Libraries**” in a new collection edited by Michael Geist, From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda (Irwin Law, 2010) <http://www.irwinlaw.com/store/product/666/from--radical-extremism--to--balanced-copyright-> [in the tradition of the earlier collection *In the Public Interest* (2005)]